

12.1	Hearings a Judge Must Conduct.....	279
12.2	Hearings a Referee May Conduct.....	280
12.3	Referees' Authority	282
12.4	Required Summary of Testimony and Recommended Findings and Conclusions.....	283
12.5	Advice of Right to Seek Review of Referee's Recommended Findings and Conclusions.....	283
12.6	Judicial Review of Referee's Recommended Findings and Conclusions.....	284
12.7	Procedural Requirements.....	284
12.8	Time Requirement for Judge's Consideration of Request	285
12.9	Stay of Proceedings and Grant of Bail	285
12.10	Standard of Review	285
12.11	Remedies	286

In this chapter. . .

This chapter discusses the authority of “juvenile court” referees and the hearings they may conduct if no demand for a judge or jury trial has been made. The chapter also states the procedural requirements for requesting review of a referee's recommended findings and conclusions following a hearing.

For discussion of judge or jury trial demands, see Section 7.10.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJJ, 1998).

12.1 Hearings a Judge Must Conduct

MCR 3.912(A) lists the hearings that a judge must conduct:

“(1) a jury trial;

“(2) a waiver proceeding under MCR 3.950 [“traditional waiver” proceeding];

“(3) the preliminary examination, trial, and sentencing in a designated case;

“(4) a proceeding on the issuance, modification, or termination of a minor personal protection order.”

*There is no right to jury trial on an alleged violation of a minor personal protection order. See Section 15.21(C). For discussion of judge or jury trial demands, see Section 7.10.

Demand for judge to preside at a bench trial in delinquency and minor personal protection order proceedings. A judge may conduct a nonjury trial in a delinquency or minor personal protection order proceeding if a proper demand has been made. Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand* for a judge to serve as factfinder may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived. MCR 3.913(B) provides that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase.

12.2 Hearings a Referee May Conduct

MCL 712A.10 sets forth the hearings that an attorney referee or non-attorney referee may conduct in proceedings under the Juvenile Code. MCL 712A.10(2) states as follows:

“(2) If a child is before the court under [MCL 712A.2(a)(1)], a probation officer or county agent who is not licensed to practice law in this state shall not be designated to act as a referee in any hearing for the child, except the preliminary inquiry or preliminary hearing. This subsection shall not apply to a probation officer or county agent who has been designated to act as a referee by the probate judge prior to January 1, 1988 and who is acting as a referee as of January 1, 1988.”

MCR 3.913, the court rule governing referees in proceedings under the Juvenile Code, provides more detail concerning the types of hearings that a referee may conduct. MCR 3.913(A)(1) states that “the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than [a hearing listed in Section 12.1, immediately above, which a judge must conduct], and to make recommended findings and conclusions.” In addition,

MCR 3.913(A)(2)(a), (c), and (d) provide more detail concerning the types of hearings that attorney referees and non-attorney referees may conduct. Those rules state as follows:

“(a) *Delinquency Proceedings*. Except as otherwise provided by MCL 712A.10, only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing, if the juvenile is before the court under MCL 712A.2(a)(1).

. . . .

“(c) *Designated Cases*. Only a referee licensed to practice law in Michigan may preside at a hearing to designate a case or to amend a petition to designate a case and to make recommended findings and conclusions.

“(d) *Minor Personal Protection Actions*. A nonattorney referee may preside at a preliminary hearing for enforcement of a minor personal protection order. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor personal protection order and make recommended findings and conclusions.”

Thus, to summarize MCL 712A.10 and MCR 3.913(A), the Family Division may assign an attorney referee or non-attorney referee to conduct the following types of proceedings discussed in this benchbook:

- If a status offense is alleged, an attorney referee or non-attorney referee may conduct any hearing other than a jury trial.
- If a violation of a municipal ordinance or state law is alleged, an attorney referee or non-attorney referee may conduct a preliminary inquiry or preliminary hearing, but only an attorney referee may conduct a pretrial motion hearing, a non-jury trial, a dispositional hearing, an annual review or review hearing, or a probation violation hearing.
- Neither an attorney referee nor a non-attorney referee may conduct a “traditional waiver” proceeding under MCL 712A.4 and MCR 3.950.
- In designated case proceedings, a non-attorney referee may conduct an arraignment, but only an attorney referee may conduct a designation hearing or a hearing to amend a petition to designate a case, a pretrial motion hearing, an annual review or review hearing, or a probation violation hearing.

- A non-attorney referee may conduct a preliminary hearing to enforce a minor personal protection order, but only an attorney referee may conduct all other hearings to enforce a minor personal protection order.
- An attorney referee may conduct a contempt hearing but may not issue an order holding a person in contempt of court. *In re Contempt of Steingold (In re Smith)*, 244 Mich App 153, 157 (2000), and MCL 712A.10(1).

12.3 Referees' Authority

MCL 712A.10(1) sets forth the authority of a referee in proceedings under the Juvenile Code, MCL 712A.1 et seq. MCL 712A.10(1) states as follows:

“(1) Except as otherwise provided in subsection (2),* the judge of probate may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of this chapter, if there is no objection by parties in interest. The probation officer or county agent designated to act as referee shall do all of the following:

(a) Take and subscribe the oath of office provided by the constitution.

(b) Administer oaths and examine witnesses.

(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge of probate* containing a summary of the testimony taken and a recommendation for the court’s findings and disposition.”

In *In re AMB*, 248 Mich App 144 (2001), the Court of Appeals emphasized that referees do not have authority to enter orders:

“Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose. In fact, that a hearing referee must make and sign a report summarizing testimony and recommending action for a judge reveals that the Legislature specifically denied referees the authority to enter orders, no matter their substance.

“To paraphrase the Michigan Supreme Court in *Campbell v Evans*,[358 Mich 128, 131 (1959)], we do not doubt that hearing referees play an extremely

*See Section 12.2, above, for a discussion of the requisite qualifications to be a referee.

*The Family Division now has jurisdiction over proceedings under the Juvenile Code. See MCL 600.1009 (references to the former juvenile division of probate court should be construed as references to the Family Division).

valuable role in the operation of the family courts, especially when attempting to handle emergency cases. However, a hearing referee's recommendations and proposed order *cannot* be accepted without judicial examination. 'They are a helpful time-saving crutch and no more. The responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge' and may not be delegated. Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case, the only appropriate appellate response is to reverse." *AMB, supra* at 217–18. (Footnotes omitted; emphasis in original.)

Note: It is unclear whether a referee's recommendation to a judge has the force and effect of an order prior to a judge's review and entry of an order.

A chief referee is not required to review a hearing referee's recommended findings and conclusions, nor may a chief referee alter a hearing referee's recommendations prior to review by a judge. *In re Chambers*, unpublished opinion per curiam of the Court of Appeals, September 29, 2000 (Docket No. 223128).

Referees are bound by the rules governing the Judicial Tenure Commission and the Michigan Code of Judicial Conduct. MCR 9.201(B)(2), MCR 9.205, and JI-19 (1990).

12.4 Required Summary of Testimony and Recommended Findings and Conclusions

MCL 712A.10(1)(c) provides that if a case requires a hearing and the taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. Similarly, MCR 3.913(A)(1) and (A)(2)(c) and (d) require a referee to "make recommended findings and conclusions."

12.5 Advice of Right to Seek Review of Referee's Recommended Findings and Conclusions

MCR 3.913(C) provides that a referee must advise the parties of the right to request that a judge review a referee's recommended findings and conclusions. That rule states as follows:

"(C) Advice of Right to Review of Referee's Recommendations. During a hearing held by a referee,

the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)."

12.6 Judicial Review of Referee's Recommended Findings and Conclusions

MCR 3.991(A)(1) states that "[b]efore signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by [MCR 3.991(B)]."

The 1988 Staff Comment following MCR 3.993 states that MCR 3.991 should not be read as giving the petitioner the right to request a review of findings and orders issued after jeopardy has attached in a delinquency proceeding. In other words, a petitioner does not have a right to request review of a "not guilty verdict" rendered by a referee following a bench trial in a delinquency proceeding.

12.7 Procedural Requirements

MCR 3.991(B) and (C) contains the procedural requirements for filing and serving a request for review of a referee's recommendations and a response to a request for review. These subrules state as follows:

"(B) Form of Request; Time. A party's request for review of a referee's recommendation must:

- (1) be in writing,
- (2) state the grounds for review,
- (3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and
- (4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed.

"(C) Response. A party may file a written response within 7 days after the filing of the request for review."

"If no . . . request [for review] is filed within the time provided by subrule (B)(3), the court may enter an order in accordance with the referee's recommendations." MCR 3.991(A)(2).

*MCR 3.991(A) is quoted in Section 12.6, immediately above.

12.8 Time Requirement for Judge's Consideration of Request

MCR 3.991(A)(3)–(4) provide a mechanism for immediate review of a referee's recommendations. Those rules state:

“(3) Nothing in this rule prohibits a judge from reviewing a referee's recommendation before the expiration of the time for requesting review and entering an appropriate order.

“(4) After entry of an order under subrule (A)(3), a request for review may not be filed. Reconsideration of the order is by motion for rehearing under MCR 3.992.”*

*See Section 9.15.

There are time limits for a judge's consideration of a request for review only if the juvenile is detained or in placement. If the juvenile remains in his or her own home, there is no time limit for consideration of the request. “Absent good cause for delay, the judge shall consider the request within 21 days after it is filed if the minor is in placement or detention. The judge need not schedule a hearing to rule on a request for review of a referee's recommendations.” MCR 3.991(D). See also MCR 3.991(F), which assigns a court discretion to hold a hearing before ruling on a request for review.

12.9 Stay of Proceedings and Grant of Bail

MCR 3.991(G) provides that the court may stay an order or grant bail to a detained juvenile, pending its decision on review of a referee's recommendations.

12.10 Standard of Review

MCR 3.991(E) sets forth the standard of review of a request for review of a referee's recommended findings and conclusions. That rule states:

“(E) **Review Standard.** The judge must enter an order adopting the referee's recommendation unless:

- (1) the judge would have reached a different result had he or she heard the case; or
- (2) the referee committed a clear error of law which
 - (a) likely would have affected the outcome, or
 - (b) cannot otherwise be considered harmless.”

12.11 Remedies

MCR 3.991(F) states that “[t]he judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case.”